This Recommended Liability Decision was followed by an Order and Decision in the 1st Quarter of 2004.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
ANGELINA OLIVAS,	)	
	)	**CHARGE: 2001CF1538**
Complainant,	)	**EEOC: 21BA00909**
	)	**ALS NO: 11482**
	)	
CARRY COMPANIES n/k/a	)	
HOLLANDER DISTRIBUTION	)	
SYSTEMS, INC.,	)	

Respondent.

RECOMMENDED ORDER AND DECISION

On February 28, 2001, a Commission Panel entered an order stating that this matter must be set for a hearing on damages. On March 19, 2001 an order was entered setting a damages hearing for May 25, 2001. However, two hearing dates on the Respondent's Motion to Vacate the Default resulted in the public hearing date being continued and reset for November 5, 2001. Said damages hearing was held on that date. This matter is ready for decision.

Findings of Fact

1. A default judgment was entered against Respondent in this matter on February 28, 2001. Consequently, there are no liability issues to be decided in this case.

2. Olivas began working for Carry Companies in July of 1997, earning $10.00 per hour.

3. Jeff Kamakowski was Olivas' supervisor.

4. Olivas was classified as a warehouse employee.

5. In May of 1998, Olivas received a .75 per hour raise, bringing her hourly rate to $10.75 per hour.

6. On a daily basis, between May and November of 1999, Jeff Kamakowski, Complainant's supervisor at Carry Companies, verbally harassed Olivas by saying the following to her:

- "Hey hey motherfucker speak English, we're not in Mexico";
- "Do you want to hear me speak Spanish? – puta (bitch), chinga tu madre (motherfucker), chupa mis lluevos (suck my balls)";

7. Olivas worked 40 hours per week.

8. Olivas did not receive a raise in 1999. When Complainant asked Kamakowski why she did not receive a raise, he said, "Oh, I forgot you gordita (fatty)".

9. Tracy Henry, Human Resources Director at Carry Companies, reviewed the personnel files of all warehouse employees at Respondent and determined that no raises were given since 1998 that were not promotion or merit based.

10. Olivas' May 1998 raise was neither promotion nor merit based. Henry did not know the reason that or basis upon which Olivas received that raise.

11. Due to Kamakowski's conduct, the environment at Carry Companies was so hostile that Olivas resigned on November 5, 1999.

12. Olivas did not begin to look for another job until December of 1999.

13. From November 1999 thru March 2000, in the want ads, there were two to three columns of employers seeking people for jobs similar to the one Complainant held at Respondent, and offering similar pay.

14. Complainant did not read the want ads during her job search.

15. Olivas applied for four jobs per week between December 1999 and December 2000.

16. During her job search, Olivas asked friends and family about possible job openings.

17. During her job search, Olivas signed up with three employment agencies.

18. During her job search, Olivas reviewed job postings at the unemployment office.

19. Olivas testified that she could not even find seasonal work during the 1999 holiday season; this tribunal finds that this claim is not credible.

20. In January of 2001, Olivas began employment at the Children's Center, earning $6.00 per hour, working 37.5 hours per week.

21. In July of 2001, Olivas resigned from the Children's Center because she could not support her family on $6.00 per hour.

22. Complainant moved to Missouri to live with her mother in order to reduce her expenses.

23. Olivas is humiliated and embarrassed because, as an adult woman, she had to move in with her mother.

24. Complainant has conducted a job search while in Missouri.

25. Complainant failed to mitigate her damages until April of 2000.

26. Complainant received $7017 in unemployment benefits.

27. Complainant received compensation in the amount of $5625 from the Children's Center.

28. Complainant is not entitled to any front pay.

29. After Olivas was constructively discharged from Respondent, her resulting financial crisis caused her to suffer from sleeplessness.

30. Because of Olivas' inability to contribute toward the bills, her fiancé left her.

31. Complainant had to have an abortion because she could not afford to have another child.

32. The move to Missouri caused stress between Olivas and her children.

Conclusions of Law

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act (Act), 775 ILCS 5/101 et seq. (1999).

2. Respondent is an "employer" as defined by section 2-101 (B) (1) (c) of the Act and is subject to provisions of the Act.

3. The evidence admitted during the public hearing in this matter is sufficient to support the amount of damages that is awarded to Complainant below.

Discussion

Pursuant to Section 8A-102(D)(4) of the Illinois Human Rights Act, due to Respondent's default the allegations in Complainant's charge are deemed admitted. A prevailing Complainant is presumptively entitled to reinstatement to a job lost because of unlawful discrimination. In the case at bar, Complainant has relocated to Missouri and does not seek reinstatement, *(Tr., pg. 95).* Consequently, that remedy is not recommended.

Complainant is also entitled to a back pay award. At the time that she separated from Respondent (November 5, 1999), Olivas was earning $10.75 per hour and worked 40 hours per week. In January 2001, Olivas obtained a job at The Children's Center, earning $6.00 per hour, and worked 37.5 hours per week. In July 2001, Olivas resigned from the Children's Center and moved in with her mother in Missouri because she could not support her family on that hourly wage; she is presently searching for another job there. Finally, Complainant received unemployment totaling $7017.60 during the relevant time period.

Respondent argues that Complainant is not entitled to back pay because she failed to mitigate her damages. Complainant responds that because failure to mitigate is an

affirmative defense, and Carry Companies failed to plead that defense, Respondent has waived the right to make that assertion. The Commission has held, however, that the failure of a Respondent to plead properly does not bar the Commission from considering the issue of failure to mitigate damages if a failure is clear from the evidence. Ruyle and Green County Mfg. Co., et al, 1991 ILHUM LEXIS 138, (February 1, 1991), citing Cliburn and Veterans of Foreign Wars, (Charge No. 1985SF0403 (August 10, 1988).

This Commission has ruled that in order to prevail on a failure to mitigate defense, the respondent must show: (1) that the complainant did not use reasonable care and diligence in seeking substantially equivalent positions, and (2) that substantially equivalent positions were available. Golden and Clark Oil and Refining Co., Ill. HRC Rep. , Charge No. 1978CF0703 (Order and Decision of the Full Commission on Rehearing, July 3, 1991). Here, Respondent has met its burden in part.

Complainant did not begin searching for work until December of 1999, one month after her constructive discharge, *(Tr., pg. 136-7)*. From November 1999 to March 2000, there were two to three columns of jobs similar to the one Complainant held at Respondent in the newspaper want ads *(Tr., pg., 236)*; Complainant did not review the want ads during her job search after leaving Carry Companies *(Tr., pg. 156)*. In fact, she testified that she submitted only four applications per week between December 1999 and December 2000, and asked friends and family about job openings *(Tr., pg. 74, 86, Complainant's Exhibits 3 and 4)*. Also, Olivas testified that she sought jobs through three employment agencies, and pursued the job listings at the unemployment office, but was unsuccessful, *(Tr., pg. 34-48, 158, Complainant's Exhibit 2)*. Waiting to hear about job openings from friends and family and submitting a mere four applications per week,

and occasionally going to the unemployment office and employment agencies, despite the fact that Olivas had children and limited funds for gas, cannot be characterized as reasonable and diligent, especially when coupled with the fact that she ignored copious want ads for similar jobs, and her claim that she was unable to find even seasonal work during the 1999 Christmas season, *(Tr., pg. 160)* – a claim that is highly suspect.

While it is true that Complainant is only required to make reasonable efforts to mitigate damages and is not held to the highest standards of diligence, Schumacher and Anden Group, 1992 ILHUM LEXIS 222, (June 18, 1992), citing Rasimas v. Michigan Department of Mental Health, 714 F.2d 614 (6th Circuit 1983), Olivas' job search can hardly be considered reasonable; looking through the newspaper want ads is the least Olivas could have done.

In Schumacher, *supra,* this tribunal found that the complainant mitigated his damages, but Schumacher **used the want ads** along with other strategies to find employment, Id. This tribunal gives little credence to Complainant's argument that she lacks the knowledge and/or sophistication to search the want ads for jobs. It is clear to this tribunal, having viewed her demeanor during her testimony, that Olivas is a reasonably intelligent woman who, if she truly wanted a job, knew to look in the newspaper.

Similarly, in Dewberry and Kraft Foods, 2001 ILHUM LEXIS 147 (August 29, 2001), this tribunal found that complainant's job search was reasonable. In that case, the complainant, *inter alia*, awoke practically everyday between 7:00 and 7:30 A.M. and **searched different newspapers** for potential jobs. In Fornell and Signode Corporation, 2000 ILHUM LEXIS 54 (June 8, 2000), this tribunal again found that

complainant had sufficiently mitigated his damages. That complainant, *inter alia,* called employment agencies, networked, and **reviewed *Chicago Tribune* ads weekly** and sent resumes to potential employers found there. Complainants in these three cases all exercised much more diligence in their job search than Olivas. Olivas' job search was less than thorough, less than assiduous, and less than industrious. Clearly, Olivas failed to use reasonable care and diligence in her search for employment between November 5, 1999 and March of 2000.

In January of 2001, Complainant obtained a job at the Children's Center, but had to resign from that job because she was unable to support her family on $6.00 per hour working 37.5 hours per week. Olivas has moved to Missouri and is living with her mother in order to reduce her expenses.

One does not have to accept intolerable employment in order to mitigate damages. Once the complainant has decided, however, that alternative employment is acceptable, she is under an obligation to use reasonable diligence to retain it. Clyburn and Veterans of Foreign Wars*, 42 Ill. HRC Rep. 176 (1988).* In the Clyburn case, the complainant quit the job because she did not like it. We concluded that quitting an alternative job for no better reason than not liking it serves to cut off damages under the Human Rights Act. There are, however, exceptions to that general rule.

In Archibald and State of Illinois, Dep't of Corrections, Ill. HRC Rep. , (1985CN0994, September 16, 1992), the complainant resigned from a job that actually paid more than the job he had held with the respondent. The explanation given for the resignation was that the commute to the new job (about an hour and a half each way) was too long. The Commission accepted the complainant's explanation and held that his

resignation under those circumstances was reasonable and therefore not a failure to mitigate his damages. Clearly, the present case is far more similar to Archibald rather than Cliburn.

Olivas quit her job at the Children's Center because she could not survive on that wage. She then moved in with her mother in Missouri in order to reduce her expenses. Complainant has conducted a job search while in Missouri, *(Complainant's Exhibit 5*). Respondent has not shown that there are an abundance of similar jobs in Missouri. As stated earlier, Respondent must demonstrate this in order to prevail on its failure to mitigate defense.

Again, in order to prevail on a failure to mitigate defense, Respondent must show both that the complainant did not use reasonable care and diligence in seeking substantially equivalent positions, and that substantially equivalent positions were available. Golden, *supra.* Respondent has failed to show that substantially equivalent positions were available from April of 2000 in the Chicagoland area or in Missouri, where Olivas currently resides. Therefore this tribunal finds that Complainant sufficiently mitigated her damages beginning in April of 2000.

Next, Complainant asserts that she is entitled to a raise that she would have received but for Respondent's discriminatory act. Carry Companies argues that it gives raises to its employees based upon merit and promotion only, and that Complainant is entitled to neither, *(Respondent's Response Closing Brief, at 19-20).* Tracy Henry, Human Resources Director at Respondent, testified that she reviewed the files of all warehouse employees and stated that there were no raises given from 1998 thru the date of the public hearing in this matter, other than for merit or promotion. Olivas began

working for Carry Companies in July 1997. She was never promoted while at Respondent, yet she received a raise in May 1998. Olivas was constructively discharged in November of 1999. When asked the basis for Olivas' raise in May of 1998, Henry stated that she did not know, *(Tr., pg. 222-223).* If Henry does not know why Olivas was given a raise in May of 1998, how can she know that all raises since 1998 were due to promotion or were merit based? Based upon this, Henry's testimony regarding Respondent's policy on raises is not credible.

Given the above, and given that it is Respondent's burden to show that the bonuses and increases that Complainant received prior to her separation from Carry Companies would not have continued, and that ambiguities in back pay awards should be resolved against the discriminating employer, since the employer's wrongful act gave rise to the uncertainty, see, Clark v. Human Rights Commission, 141 Ill. App. 3d 178, 490 N.E.2d 29, 95 Ill. Dec. 556 (1st District, 1986), this tribunal finds that Olivas received a .75 per hour raise in May of 1998, approximately one year from her start date. Thus, she is entitled to another .75 per hour annual raise beginning in May of 1999, when her back pay award is calculated.

584 days elapsed between April 1, 2000 (the date from which Complainant is entitled to back pay, see, *supra*) and November 5, 2001 (the date the public hearing commenced). At $11.50 per hour (Complainant's pay rate including a .75 per hour raise that should have been received in May of 1999), Olivas is entitled to $53,728 in back pay.

That award must be reduced by $7017 (the unemployment benefits that Olivas received) and $5625 (the amount that Olivas received from the Children's Center

between January 2001 to July 2001, earning $6.00 per hour for 37.5 hours per week). In sum, Olivas' back pay award will be **$41,086**.

Next, Complainant has requested three years of front pay**,** but that request should be denied. Although reinstatement is not feasible here, front pay is a very rare remedy in this forum, and Complainant has offered no justification for that remedy in this case. There is no indication that she: (1) is unable to work or that she (2) will be unable to replace her former income with something comparable. Also, no evidence was provided showing that Complainant's ability to find other comparable employment was hampered by the effects of the alleged harassment. Thus, I do not recommend an award of front pay. On these facts, three years of front pay would be an unjustified windfall for Complainant. See, Holmes and Chicago Board of Education, 1998 ILHUM LEXIS 270 (September 2, 1998), Belgrave and Southwick Properties, Inc., et al. 1998 ILHUM LEXIS 203 (February 20, 1998).

Next, Section 5/8-104(B) of the Act provides for actual damages for injury or loss suffered by the Complainant. Actual damages include compensation for non-economic damages such as emotional harm and mental suffering. ISS International Service System, Inc. v. Illinois Human Rights Commission, 272 Ill.App.3d 969, 651 N.E.2d 592 (1995). Where recovery of pecuniary losses will not compensate the complainant for all actual damages, an award sufficient to make up for the emotional suffering, humiliation, and embarrassment of the complainant is warranted. Damages for emotional distress are based on the level of distress felt. Smith and Cook County Sheriff's Office, 19 Ill.HRC Rep. 131 (1985), Kuhlman and Korner House, ALS No. 9696 (Ill. Hum. Rts. Comm., 1997).

Complainant has suffered emotional pain, but has not indicated profound change in behavior or physiological change as a result of the discriminatory behavior. However, she is still entitled to emotional damages. See, Patrick and City of Centralia Police Department, 1999 ILHUM LEXIS 285 (November 16, 1999).

To demonstrate that she is entitled to actual damages beyond back pay, Complainant must show extraordinary emotional suffering **or** outrageous conduct on the part of Respondent. Lipsey and Cook County Criminal Justice Commission, Ill. HRC Rep. (Charge No. 1979CF0261, April 12, 1991). In the present case, Respondent's conduct was sufficiently egregious to warrant emotional distress damages.

On a daily basis, between May and November of 1999, Jeff Kamakowski, Complainant's supervisor at Carry Companies, verbally harassed Olivas by saying the following to her:

- "Hey hey motherfucker speak English, we're not in Mexico";
- "Do you want to hear me speak Spanish? – puta (bitch), chinga tu madre (motherfucker), chupa mis lluevos (suck my balls)";
- When Complainant asked Kamakowski why she did not receive a raise, he said, "Oh I forgot you gordita (fatty)".

Further, the credible testimony of Complainant established that Respondent's discriminatory behavior resulted in many stresses on her, which impacted on her family as well. After Complainant determined that Kamakowski's behavior and the resulting hostile environment made it impossible and unreasonable for her to remain at Respondent, Olivas suffered sleeplessness, and her fiancé left her due to her inability to pay bills, *(Tr., pg. 96-104, 109-110)*. Also, Complainant had to have an abortion because

she could not afford to have another child, *(Tr., pg. 104-109).* Finally, Complainant was forced to move to Missouri and live with her mother because of her bad financial situation. Having to move in with her mother caused Complainant to be humiliated and embarrassed, and caused stress between Olivas and her children, *(Tr., pg. 110-111).* Based upon the above, Complainant is entitled to an award for emotional distress. See, Torres and Maloney Coachbuilder, 1996 ILHUM LEXIS 1080, (November 22, 1996). However, Complainant must bear some responsibility for her financial troubles, see, *supra*. It is recommended that Complainant receive $9,000 for her emotional distress damages. This, plus her back pay award will sufficiently compensate Complainant for her actual damages.

Because of the substantial delay in her receipt of the above recommended damage awards, prejudgment interest is necessary to make Complainant whole. Such interest is recommended on the back pay award.

Additionally, it is recommended that Respondent be ordered to clear all references to this case or to the underlying charge of discrimination from Complainant's personnel records and provide her with a neutral letter of reference.

Recommendation

Based upon the foregoing, Respondent was found to be in default and therefore Complainant's allegations that Respondent discriminated against her on the basis of national origin are deemed admitted. Accordingly, it is recommended that Complainant be awarded the following relief:

A. That Respondent pay to Complainant the sum of $41,086 for lost back pay;

B. That Respondent pay to Complainant $9,000 in emotional distress damages;

C. That Respondent pay to Complainant prejudgment interest on the back pay award, such interest to be calculated as set forth in 56 Ill. Adm. Code, Section 5300.1145;

D. That Respondent clear from Complainant's personnel records all references to the filing of the underlying charge of discrimination and the subsequent disposition thereof and provide her with a neutral letter of reference;

E. Pursuant to the March 13, 2003 Order entered in the case at bar, Complainant had until April 11, 2003 to file a motion requesting attorney's fees. No motion was filed, so no attorney's fees are sought in this matter.

HUMAN RIGHTS COMMISSION

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BY:
WILLIAM H. HALL. IV
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: April 16, 2003